IN THE MATTER OF THE HUMAN RIGHTS CODE OF ONTARIO

and

IN THE MATTER OF THE COMPLAINT OF DOUGLAS BONNER ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF HANDICAP BY HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AND THE MINISTRY OF HEALTH, INSURANCE SYSTEMS BRANCH

APPEARANCES

Anthony Griffin	On behalf of the Ontario Human Rights Commission
Janice A. Baker	On behalf of the Respondents

DECISION

INTRODUCTION

In the complaint giving rise to these proceedings it is the contention of Mr. Douglas Bonner and the Ontario Human Rights Commission (the "Commission") that her Majesty the Queen in the Right of Ontario and the Insurance Systems Branch of the Ministry of Health ("OHIP") infringed his right to equal treatment with respect to employment without discrimination because of handicap, in contravention of Sections 4(1) and 8 of the Ontario Human Rights Code, 1981, S.O. 1981, c. 53, as amended. For the sake of convenience OHIP is referred to hereafter as the employer and no reference is made to the first respondent.

Mr. Bonner suffers from depression and anxiety, a condition that the respondent readily accepted as amounting to a handicap within the meaning of s.9(1)(b) of the Code. He maintains that his handicap affected his ability to perform the work for which he was employed and played a part in the making of the decision to release him from his employment in 1987 at the end of his probationary period with OHIP. It was further asserted that the complainant's handicap could have been accommodated without undue hardship on the employer.

In respect of this alleged infringement of the complainant's rights, general damages in the range of $6,000 to $8,000 are sought, along with special damages for lost earnings and other benefits for a period of one year, the exact sums to be worked out by the parties. The Commission also seeks an order requiring the respondent to re-employ the complainant for another year of probation and directing it to co-operate with him and his doctor in assuring that he is treated with appropriate understanding and sensitivity regarding his handicap.

The respondent asserts that Mr. Bonner was released at the end of his probationary period because he failed to meet the requirements of his position and that, if his unsatisfactory performance was the result of incapacity caused by his handicap, since there was nothing it could have done to accommodate that handicap so as to render the complainant capable of fulfilling the requirements of his job it has not infringed his rights under the Code.

The provisions of the Code relevant to these issues read as follows:

> 4.-(1) Every person has a right to equal treatment with respect to employment without discrimination because of ... handicap.
>
> 8.- No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> 16.-(1) A right of a person under this Act is not infringed for the reason only,

> (b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

Although section 16(1) of the present Code is virtually the same as section 16(1)(b) above, there was no counterpart in 1987 to the present section 16(1a) which reads as follows:

> 16.-(1a) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

However, the jurisprudence relating to the earlier provision was to the same effect as the present section 16(1a) of the Code, the position having been expressed in the following way in Belliveau v. Steel Company of Canada et al., 9 C.H.R.R. D/5250, at D/5251, paragraph 39564:

> The onus is upon the respondents to establish that the complainant is incapable of doing his job. As stated, it is not enough for the respondents to have an honest belief in the complainant's inability - rather, they must show on an objective basis that a reasonable person in the position of the employer would conclude that he was incapable. Moreover, if an employer can accommodate the employee without undue hardship, then the employer must do so. Put otherwise, an employer cannot establish that an employee is incapable unless it shows that reasonable accommodation is either not possible at all, or at least that it is not possible without undue hardship to the employer. Although section 16(1a) of the present Code, which expressly imposes the reasonable accommodation requirement, was not in force at the times relevant to this complaint, the case law has held that the requirement of reasonable accommodation was inherent to the wording of section 16(1)(b) as originally enacted.

Although there is no substantial dispute between the parties as to the law applicable to the circumstances of this case, there is considerable disagreement as to the effect of its application and, because it appears to be a case largely of first impression, very few precedents were referred to.

THE EVIDENCE

Following his secondary school education Mr. Bonner attended St. Lawrence College in Kingston where he completed in 1970 a two year programme in general business, with a data processing major. Since graduating he has taken a number of related courses offered by St. Lawrence College, by the University of Calgary when he was in Alberta, and by various companies and agencies.

Mr. Bonner began work in December 1971 as a computer operator with Millhaven Fibres Limited of Kingston. He became a "Junior Programmer" there some three and a half years later. He left that company in June 1976 because he felt blocked from further progress. He took time off to travel to Vancouver.

In August 1976 Mr. Bonner was engaged by the Kingston General Hospital as a "Programmer Analyst." He was designated "Supervisor of Computer Services" in 1978. He left that employment in April of 1980 when the hospital installed a new system for which his services were not required.

Mr. Bonner did not seek work until October of 1980 when he obtained employment as a "Programmer Analyst II" with a company in Calgary called Nova. He became a "Systems Analyst" at Nova a year later, but he left in July 1983 because he "couldn't get along with [his] boss." During the course of the second year of his employment with Nova, Mr. Bonner was hospitalized for a period of "three or four months".

Although work was available, Mr. Bonner decided to take some more time off before going to work in December of 1983 as a "Senior Programmer Analyst" with Alberta Treasury Branches. He left that position the following December because he wanted to return to the Kingston area.

Mr. Bonner next worked for Canada Systems Group in Ottawa from January 1985 to June 1986 as a "Programmer Analyst" but, his

objective in leaving Calgary having been to return to Kingston, he applied for a position in that city with OHIP and was hired on June 2, 1986, as a "System Operator 2". He was released the following May 29th for "failing to meet the requirements of the position" during his probationary year of employment.

In August 1986, while working for OHIP, Mr. Bonner became a patient of Doctor Nicholas J. Delva, M.D., F.R.C.P., an Associate Professor in the Department of Psychiatry at Queen's University, Kingston. At that time his medical history revealed episodes of "Major Depression" occurring in 1971, 1973 and 1980, and a period of hospitalization in Calgary in 1982 which was diagnosed at the time as "Dysthymic Disorder".

Dr. Delva stated that the criteria commonly used for making psychiatric diagnoses are set out in the American Psychiatric Association's manual entitled "Diagnostic and Statistical Manual of Mental Disorders (Third Ed., Revised)." According to the criteria by which this manual defines a "Major Depressive Episode," a patient must exhibit at least five of nine listed symptoms. Where two or more of these episodes have occurred the patient is diagnosed as suffering from "Major Depression, Recurrent," and subsequent milder mood disturbances are classified as "Major Depressive Episodes in Partial Remission." (See Dr. Delva's report of September 26, 1991, Exhibit 2, Tab 2.)

When first seen by Dr. Delva, Mr. Bonner showed only mild symptoms of his condition, was "enjoying his work" at OHIP and was "coping quite well." However, Dr. Delva's report goes on to state that by the fall Mr. Bonner:

> ... was experiencing more depressive symptoms, including anorexia, decreased interest in activities, anergia, poor concentration, low mood, suicidal thoughts, and agitation and thus was suffering a Major Depressive episode. ... He was binge drinking at weekends, and had to drop the course he was taking at St. Lawrence on Systems Analysis. These symptoms remitted to some extent but persisted to a greater or lesser extent through the winter and by the end of January became more severe, so that he had to miss work for about two weeks. At that time his mood was very

> low and he had suicidal ideas, anorexia, insomnia, poor concentration, anergia, and was hopeless. ... He improved enough to permit him to return to work on February 16, 1987. ... [This Major Depressive Episode] was associated with complete inability to function occupationally during early February, 1987. It was associated with a milder degree of deficit, which fluctuated in intensity, both before and after the period of absence from work."

Mr. Bonner became seriously depressed after being released by OHIP and, following a suicide attempt in July of 1988, he remained in the psychiatric ward of the Kingston General Hospital until entering a vocational rehabilitation programme in November, 1988. This programme led to his placement in Kingston in June 1989 with Empire Financial Group, for whom he worked in a non-paying capacity for some three months before being offered and accepting a six months contract with that company, ending on March 1, 1990. He was unemployed at the time of the hearing.

When Mr. Bonner applied to OHIP he did not disclose his mental handicap. Of course, he had no obligation to do so. Indeed, under s.22 of the Code an employer would infringe the right conferred by s.4 of the Code simply by inquiring about such a matter, unless the questions asked concern "a prohibited ground of discrimination where discrimination on such ground is permitted under this Act" (as under s.16(1)(b), supra). In any event, Mr. Bonner's handicap was not self-evident, and OHIP had no inkling of its existence until eight and a half months after he began work there under the supervision of Mr. Bryan Brown. In fact, it was not until the end of March, 1987, that the condition and its affect upon his ability to work were described to the employer in any kind of detail.

It is clear from his evidence that Mr. Bonner was at all times reluctant to disclose his condition for fear of adverse reaction. This reluctance was sharpened vis a vis his immediate supervisor when Mr. Brown recounted an incident that occurred during a conference held at the psychiatric hospital in Kingston in September of 1986. Some patients had disrupted the meeting in a way that Mr. Brown said he and others found amusing. In relating

this event at work in the presence of Mr. Bonner, Mr. Brown referred to these patients as "Loonies". Mr. Bonner said nothing at the time, and it was not until he saw reference to his remark in the complaint that it occurred to Mr. Brown that that expression may be offensive to some persons, and he testified that he has "basically stopped using" it.

While Mr. Brown's reference to "Loonies" was given by Mr. Bonner as one reason for his reluctance to tell his immediate supervisor about his condition, he did not suggest that it was that incident, or any other conduct of anyone at OHIP, that triggered the onset of his deepening depression in the fall of 1986.

By the beginning of February, 1987, Mr. Bonner's condition had become such that, on his doctor's advice, he stayed away from work for two weeks commencing on the second of that month. Although two handwritten notes from Dr. Delva regarding this absence eventually came into the hands of Mr. Brown, the parties are not in agreement as to when this occurred.

The first note (Exhibit 2, Tab 4) was dated February 2nd, 1987. It stated that Mr. Bonner had been under Dr. Delva's care since August and "is currently suffering from marked anxiety & depression so that he is unable to work. I will write when he is able to return to work. Please do not hesitate to call me ... for further details." The complainant says he called Mr. Brown on February 2nd to tell him he would not be in to work, but did not tell him why. He says Mr. Brown "demanded" a note from his doctor immediately, that he then called his doctor who prepared the handwritten note which he took to the office that same day.

Mr. Brown confirmed that the complainant called in sick on the 2nd of February, but denies having demanded a doctor's note. He said Mr. Bonner called him again on February 4th to say he would not be in for the rest of the week, and that it was then that he asked about the nature of the illness. He said that Mr. Bonner declined to discuss the matter until his return and that he did not

press him about it.

The second note (Exhibit 2, Tab 5) was written on February 9th, informing persons to whom it may concern that "Mr. Bonner's condition has improved sufficiently that he can attempt to return to work on Feb 16/87. My next appointment with him is after work on that date. Please contact me for further information if desired."

Mr. Brown testified that he called Mr. Bonner at home on February 10th because he had expected him to return to work that day. Not yet having received either of these notes, he inquired again as to the nature of the illness and Mr. Bonner then disclosed that he was suffering from "anxiety and depression and was under medication."

This conflict in their testimony raises a question as to the credibility of the witnesses which is conveniently dealt with at this point. The demeanour and consistency of the respondent's witnesses convinced me that they were entirely honest and open in their testimony. At the same time, I have no doubt that Mr. Bonner was also telling the truth as he saw it. While their accounts of most events are compatible, there is considerable confusion and contradiction in Mr. Bonner's testimony, and I find that of the respondent's witnesses preferable wherever the evidence of the parties differs. Perhaps the confusion in the complainant's evidence was the result of some affect his condition had on his perception of matters. In particular, his account of events relating to his absence from work in February of 1987 appears to have been coloured by a demonstrably unwarranted conviction that he had been dealt with harshly and unfairly in that regard.

His superiors at OHIP were not made aware of Mr. Bonner's condition until nearly nine months after he began his employment, and he did not suggest that he was dealt with unfairly prior to then. However, in describing that most substantial period of his employment at OHIP he made comments impugning the knowledge and

ability of his supervisors, suggesting amongst other things that they selected inappropriate computer language for various programmes. Later, when responding to specific criticisms made of him in performance appraisals, he attributed many of the mistakes imputed to him to these supposedly wrongheaded decisions of his supervisors.

In contrast, the evidence of Messrs Brown, Copland and Burgess shows clearly the complexity of OHIP's operations, the pressure of deadlines and the need for flexibility and maintainability in the programmes OHIP designed and ran. There was no evidence at all that the decisions they made regarding the work to be done and the manner of doing it were inappropriate. Those decisions were not taken in order to confound Mr. Bonner, but because they were called for in the judgment of those in authority whose experience, skill and knowledge appears on the evidence to be substantially greater than his. Indeed, in reviewing the evidence I have concluded that, as counsel for the respondent asserted, Mr. Bonner did not fully understand, either at the time or when giving his evidence, what it was that they were trying to accomplish with their programmes at OHIP.

An example of Mr. Bonner's apparently abiding conviction that he knows more than his supervisors about certain aspects as to how the work at OHIP should be done is his testimony regarding an incident in which he says he sought help from Mr. Copland in "debugging" a particular programme. He said that instead of getting the help he specifically requested he was "given an hour long lecture on Bob Copland's crazy ideas about programming, his philosophy. ... it was the most absurd thing that anybody will ever tell you. " (Transcript of Evidence, Volume 2, p. 87.) He then went on at length to insist rather intemperately that Mr. Copland did not know how such programming should be done, whereas he (Mr. Bonner) had been doing it correctly in the way his professor had said it should be done. Not only was that opinion unsubstantiated but, in light of Mr. Copland's explanation of the programming

approach and standards used in his branch, and of why it was that Mr. Bonner's approach was unacceptable and was in fact causing the errors in question, I am quite satisfied that the complainant's criticism was misplaced. Moreover, since Mr. Bonner was expressing his current views as to the competence of the supervisory staff at OHIP and as to the way he thinks specific kinds of programming there should be carried out, it is difficult to see how he could fit into their operations even if given another opportunity.

Mr. Bonner's testimony regarding his absence in February was confused and inconsistent to an extent not explainable simply because of the lapse of time. It also indicates clearly his feeling that he was unfairly treated at that time. According to him letters from his doctor were "demanded" of him and he was "forced" to deliver to OHIP that same day Dr. Delva's note of February 2nd: "I wasn't even in shape to be driving, but I was told to bring it in." He wrongly, but I believe sincerely, sees himself as having been compelled to leave home while too ill to do so in order to deliver a document excusing his absence on account of that very illness. It is difficult to believe that anyone would act so callously, and not even an improper motive for doing so could be imputed to Mr. Brown who knew nothing of Mr. Bonner's condition at the time.

Mr. Bonner's testimony regarding these notes continued as follows: "In fact, it [the first note] was not satisfactory enough because it did not state a medical reason, so I was -- then had to bring another letter to state what was wrong with me." Referring to these two letters, Mr. Bonner said "One was that I was just sick and the other demand was I had to bring a letter stating -- like sick wasn't good enough, not at all. ... I was forced [to bring the second letter]. I did not want to disclose that information, and plus I was harassed at home to bring it in. I kept getting phone calls at home [from] Brown. He wanted documentation about what was wrong with me." (V. I, pp. 117-118. Emphasis added.) Of course, contrary to Mr. Bonner's assertion, it was the first note that

stated the medical reason for his absence, the second one only indicating the expectation that he would be well enough to return on the 16th. Although Mr. Bonner had these notes before him, he could not recognize the inconsistency in what he was saying.

Mr. Brown's evidence regarding these events was that Mr. Bonner called him on the first day of his absence to tell him that he would not be in that day, and then called again on the third day to say that his doctor said he should take the rest of the week off. He testified that he did not on either of those occasions ask Mr. Bonner to bring in a letter from his doctor. That there would be a second note from Dr. Delva in due course was stated in the first note, and from its very nature it is obvious that the second note was not prepared in response to a "demand" by anyone. Mr. Brown said that when, contrary to expectations, Mr. Bonner did not show up at work on the 10th of February, he called him "out of concern for his state of well-being and [because] I felt that there may be something that I or others at work could do to support him." (V. 4, p. 71.) During the course of this call Mr. Brown inquired again as to the nature of the illness. This time he was given the information contained in the note written by Dr. Delva on February 2nd, which was clearly meant to be given to him in any case and was not obtained as the result of badgering. Mr. Brown said that on this occasion he asked Mr. Bonner to bring a letter from his doctor upon his return simply as a matter of routine. That was the only call that he placed to Mr. Bonner who, in fact, was not subjected to harassment through repeated phone calls forcing him to reveal information he did not want to disclose. In his memorandum to Mr. Burgess, of March 23rd, 1987, and in his direct testimony, Mr. Brown indicated that he received both of Dr. Delva's notes on February 12th.

Mr. Bonner's confusion regarding this matter was even more apparent during cross-examination. He was uncertain whether he had brought in both of Dr. Delva's notes, or only one of them; and, if it was only one, he was unsure as to which it was: "These letters

were brought in, at least one if not both by me personally to OHIP, as I was told I had to bring them in." (V. 2, p. 51.) He then said (at pp. 53 and 54.):

> I phoned in sick, I did not want to tell him why. Some time passed, I'm not sure, I can't say exactly how much time, Mr. Brown phoned me at home and told me I had to provide him with a letter from my psychiatrist. I mean, that's why you see February 2nd as the date. Dr. Delva would not have written that February 2nd if I didn't bring it in until -- that was brought in the day Dr. Delva wrote it, because I had to go to Dr. Delva to get him to -- and that's why it's handwritten, because it was rushed. I phoned Dr. Delva up and said, you know, "Nick, they are hounding at me at work for -- to bring them documentation."

Mr. Bonner recalled phoning Mr. Brown on February 2nd to say he was sick. He remembered Mr. Brown calling him some time later and raising the need for a doctor's letter, but he is not sure "how much time passed." Up to that point his recollection, though vague, is consistent with that of Mr. Brown. However, Mr. Bonner then attempted to reconstruct what he could not remember by drawing inferences from the February 2nd note. Because it was handwritten, he surmised that it had to have been rushed, and he concluded that Mr. Brown must have called him back that same day, and that he must have called Dr. Delva who in turn must have written the note hurriedly so that he could pick it up and deliver it to Mr. Brown that same day. It seems clear that Mr. Bonner does not remember when Mr. Brown called him, or how often. Obviously, he has no accurate recollection of what they said.

When the complainant returned to work on February 16th, Mr. Brown met with him briefly "to make sure that he was okay and could basically perform his job." Mr. Brown testified that Mr. Bonner told him that he was feeling better. Since the note of the 9th stated that he had improved sufficiently to attempt to return to work on Feb 16th, Mr. Brown assumed that he was well enough to do his job when he came to work that day. Despite that reassurance to the contrary, however, Mr. Bonner testified that in fact he did not

feel any better upon his return than he had felt during his absence.

The first evaluation of the complainant's performance since starting on June 2, 1986, was not made until on or about March 18, 1887. Although OHIP's normal policy appeared to call for quarterly appraisals of probationary employees, what occasioned this departure from the alleged practice was not brought out. However, since it was not suggested that it had anything to do with Mr. Bonner's handicap, either directly or indirectly, that circumstance does not go towards establishing discrimination in employment in breach of sections 4(1) and 8 of the Code.

An appraisal form expressly purporting to cover the entire period of employment to March 20, 1987, was presented to Mr. Bonner for his comments and signature in spaces provided in the form for the purpose. The form is dated March 18, 1987, and was apparently signed by Mr. Brown that day. (Exhibit 1, Tab 8.) However, that assessment, which was negative, appears to have been given to Mr. Bonner on March 20th, a Friday. Mr. Bonner said that he had wanted to have the weekend to consider how best to respond to it, but that Mr. Brown "was very curt with me when I asked him for the time to properly respond to the allegations. ... First I protested, then I asked for time, then I was dismissed quite curtly back to my desk and wrote what you see there [on the form] as quickly as I could." (V. I, p. 122 and p 129.) According to Mr. Bonner, the reason given for requiring him to write his response to the assessment within a short time that same day was that it was the only copy of the document and it could not be taken out of the building. Given the easy access to photocopiers he found this to be a thin excuse, and his evidence suggests that undue pressure was being placed on him.

It was Mr. Brown's evidence that, while the original form had to be completed and signed by an employee on the day it was made and could not be taken away, he told Mr. Bonner that all he had to do was write a note in the space provided to the effect that his

comments would follow by way of a letter to be prepared over the weekend which would be readily accepted as his comments on the appraisal. Immediately after this interview Mr. Brown made a note of their conversation while the matter was fresh in his mind (Exhibit 3, Tab 6), and I have no doubt as to the accuracy of his recollection. However, instead of following this suggestion, Mr. Bonner wrote his comments that day, addressing some of the specific points made in the evaluation and adding the following statement: "I have been and am experiencing health problems which affect my job performance and my superior was informed of the situation and never followed up at all."

Mr. Bonner then received from Mr. Burgess, the director of OHIP at Kingston, a memorandum which he viewed with great alarm, regarding it as an ultimatum the effect of which was that his "days were numbered." (V. 1, p. 130.) That memorandum (Exhibit 1, tab 9) is dated March 19, 1987, the day before Mr. Bonner seems to have received the assessment. It reads as follows:

> I have reviewed your written performance appraisal with your Project Manager.
>
> It is apparent that, in the estimation of your Project Manager, your performance requires improvement in order to meet the requirements of the job.
>
> In order to ensure that I.S.B.'s assessment of your performance and abilities are as fair and as accurate as possible, I am recommending that you be rotated to another application area for a period of two months under the supervision of a different Systems Support Supervisor to ensure complete objectivity. During this assessment period, you will be given the advice and assistance expected for an SO2 Programmer with nine years experience.
>
> At the end of two months, coinciding with the completion of your probationary period, an assessment will be completed and we can discuss your performance and future with the Government of Ontario at that time.
>
> We will work with you in an attempt to assist you in meeting the requirements of your current position. If you have any further questions, please do not hesitate to

contact me.

Mr. Burgess was asked why it was he did not seek Mr. Bonner's immediate release from employment on the basis of the negative assessment, rather than arrange a transfer to another supervisor. One reason given was that it was still hoped that Mr. Bonner could meet the required standard, a similar move of an employee who had been experiencing performance problems some years before having proven successful. Another reason was that some rotation during probation was normal practice, and this move happened to coincide with the culmination of the project that Mr. Brown had been working on throughout the time that Mr. Bonner had been assigned to him. However, it is clear that the March 19th decision to change Mr. Bonner's supervisors was not made in an attempt to accommodate his condition, because Mr. Burgess lacked sufficient information at that time to associate his performance with a health problem affecting the complainant throughout his entire employment. Mr. Bonner had not yet added his comments to the appraisal, nor had Mr. Burgess received the following letter from Dr. Delva, dated March 30th, 1987:

> Mr. Bonner has been a patient under my care since August 1986. At present he is being treated for anxiety and depression with a number of medications as well as counselling. His psychiatric problems go back to 1971 and include several hospitalizations for depression.
>
> I am aware of the problems Mr. Bonner has had with his ability to work over the past year. He had expressed difficulty with concentration and ability to cope and this was at a marked level and he was depressed enough to require time off work earlier this year.
>
> Over the period of probation, therefore, this individual has required considerable psychiatric help and has had considerable psychiatric symptoms and I would ask you to take this into consideration in your appraisal of his performance.
>
> Please do not hesitate to contact me by phone at ..., or by letter to discuss any questions you might have about this man.

Mr. Burgess wrote back on March 31, 1987, stating that:

> As a result of your letter I am prepared to take into account Doug's medical problems over the past 10 months. It should be noted, however, that we do have a minimum standard for employees and Mr. Bonner will have to meet that standard for the balance of his probationary period or we will have no alternative but to release him.
>
> I have communicated this situation to Doug and reiterated our desire to assist him in any way we can to meet the minimum requirement of the position.

Although the decision to move Mr. Bonner could not have been motivated by any desire to try to "accommodate" his condition, it was not until April 2nd that he was transferred to another department. By then the above exchange of correspondence had occurred (Exhibit 2, Tabs 5 and 6), and specific arrangements relating to his condition might then have been made; but none was even suggested, either by Mr. Bonner or by Dr. Delva, and no further information or advice was sought from Dr. Delva in that regard. Mr. Burgess did say that the possibility of extending the probation period had occurred to him; but that idea arose in the context of extending the opportunity to judge Mr. Bonner's performance and not as a result of casting about for some means of improving that performance. Upon being informed that this could not be done Mr. Burgess did not pursue the matter.

Mr. Bonner was assigned to Robert Copland at the beginning of April, but at his request his new supervisor was not told about his condition. (V. 3, p. 62.) Mr. Copland did not learn that there was a health problem until Mr. Bonner told him so the day he left OHIP. (V. 5, p. 53.) Obviously, Mr. Copland could not have taken his condition into account when assigning him specific tasks and assessing his performance, nor could he reasonably have been expected to do so. However, Mr. Burgess had informed him that there had been some problems in Mr. Brown's area, and had said that "he wanted me to take Doug for two months and give [him] my assessment of his performance." (V. 5, p. 8.) Mr. Copland testified that he arranged suitable work that would lend itself to

an evaluation of the skills called for by the position Mr. Bonner held.

On May 5th, Mr. Copland sent a memorandum to his immediate superior, Mr. Dave McNicol, regarding Mr. Bonner's performance, a copy of which was sent to Mr. Burgess. Another such memorandum was sent on May 19th. Both of these evaluations were negative. Mr. Burgess then wrote to Mr. Bonner on May 19th advising him that he was being released as of May 29, 1987, because "in my opinion and that of your supervisors, you do not meet the minimum standard for employment as a Programmer Analyst (SO2)." (Exhibit 1, Tab 13.)

In my view no useful purpose would be served by reviewing herein the specific shortcomings attributed by these memoranda to Mr. Bonner's performance. Similarly, I see no need to address the particulars of Mr. Brown's March 18th appraisal of the complainant even though much of this testimony, and that of Mr. Bonner, was taken up with the merits of these assessments. Having examined that evidence carefully, I am persuaded that the complainant's performance was in fact unsatisfactory, that he failed to grasp what were the objectives of various operations and programmes, persisted in using techniques and approaches that he was advised were inappropriate, took too long with his assignments and made a number of mistakes in carrying them out.

Mr. Bonner, who began with OHIP in June, 1986, was depressed enough that summer to seek psychiatric help by August. He could not concentrate and this led to "stupid mistakes." At one point he attributed Mr. Brown's appraisal to his illness, and his written comment on the appraisal form alleges that his condition affected his performance. His doctor testified that his "job loss was directly related to his psychiatric problems over the past year." According to Dr. Delva, Mr. Bonner had entered into a major depressive episode by the fall of 1986 (whether early or late fall was not made clear), and that condition appears to have lasted until at least the middle of February of 1987 when he was told he could attempt to return to work. However, according to his own

evidence he felt no better upon his return, and he was soon after devastated by the negative assessment and the letter from Mr. Burgess towards the end of March. Thus, it would seem almost certain that this serious level of depression continued until he left OHIP, after which it worsened, leading to months of hospitalization and an inability to work for all but eighteen months between then and the start of the hearing. He said that such depression and anxiety leads to "a severe lack of concentration ability, and to a programmer that will be deadly" to the point that he could not even understand a computer programme if it were set before him. He made mistakes in respect of routine, simple things, such as "proofreading, programme debugging, lack of interest in my job ... it affected everything I did in my job." (V. 2, pp. 42, 43 and 46.)

In the end, the thrust of the argument made by counsel for the Commission was not that Mr. Bonner was discriminated against despite attaining an acceptable standard of performance. Rather, it was that, his unsatisfactory performance having been caused by a handicap for which no proper accommodation was made, his rights were infringed - and, it was admitted, only indirectly, if at all. (See V. 6, p. 44.)

Before dealing with the evidence relating to the matter of accommodation of the complainant's handicap, I would observe that, in my view, it cannot reasonably be expected that the respondent should undertake to accommodate a handicap the existence of which it could not be expected to know. And, it is to be noted, the complainant deliberately chose to keep OHIP in the dark about his condition until over eight months after his employment had begun.

When Mr. Bonner returned to work on the 16th of February, 1987, his assignments were not altered by Mr. Brown with a view to somehow accommodating his condition of depression and anxiety. It did not occur to Mr. Brown that any change in workload was required. In this regard counsel for the respondent had the following exchange with Mr. Brown (V. 4, p. 72):

> Q. Did you have any concern at that point about what problems this might cause him at work if he suffered from anxiety and depression?
>
> A. No.
>
> Q. Why was that?
>
> A. Well, the terms anxiety and depression to me as a non-physician were not that significant in my mind. I believe that most people feel certain levels of anxiety and/or depression during their life and it didn't hit me as a major medical problem, those terms, nor did "under medication". In fact, it's very seldom that any individual goes to a doctor with a health problem that doesn't end up being under medication of some sort.

Mr. Brown was asked by counsel for the Commission whether, after reading the comment written by the complainant on the March appraisal, he had tried "to figure out whether his performance had been affected by his health." Mr. Brown said he had not made that effort because Mr. Bonner "was basically finished working for me and I was not about to go back and rewrite a performance appraisal that I had just delivered. (V. 4, p. 156.) In counsel's view, however, Mr. Brown should have been trying "to figure out whether there's a causal connection between Mr. Bonner's condition and his performance," but instead, "he's finished with Mr. Bonner and isn't interested." (V. 6, p. 16.)

It seems to me rather impractical to suggest that Mr. Brown ought to have reviewed his assessment of the previous ten months work in order to try to determine the extent to which, if at all, his illness may have affected Mr. Bonner's performance. Whatever its cause, the performance was in fact unsatisfactory, and it would appear virtually impossible to determine in respect of particular deficiencies in his work the degree to which the shortfall from the required standard was attributable to the illness, qualitatively as well as quantitatively. The most that could be expected is that, in due course, the allegation that past performance was affected by illness would be taken into account in some way by more senior management. And this was done. When questioned by me at length in

this regard, Mr. Burgess testified that he had been prepared to discount entirely the assessment of Mr. Bonner's performance over the first ten months - including the period from February 16th to March 31st - and to base the decision to retain or release the complainant on his performance during the last two months of his probation. "Had Mr. Bonner's performance been acceptable to Mr. Copland I'm sure we would not be sitting here today, we would have gone on, but it was not ... acceptable to our levels in that, the most simplest part of our shop." (V. 3, p. 143.)

As to the period following Mr. Bonner's return to work on February 16th, like Mr. Brown, Mr. Burgess did not conclude from Dr. Delva's notes that the complainant required special treatment or other arrangements to accommodate a handicap, nor did he find anything in those notes to cause him to think it necessary to contact the doctor. He assumed that Mr. Bonner's return to work indicated that he was well enough to resume his duties, and Mr. Burgess said that, had he thought about it at all, his assumption would have been that the doctor would contact him if there was anything that he needed to know.

In respect of this aspect of the evidence, it was suggested by counsel for the Commission that an employer should not assume that an employee is well enough to resume normal duties simply because he or she has returned to work. Inquiries should be made. As already noted, Mr. Bonner's immediate supervisor, Mr. Brown sought and received the complainant's assurance that he was well enough to resume work. But it was implied that this ought not to have been accepted at face value and that someone at OHIP ought to have contacted Dr. Delva in order to learn more about the complainant's condition, particulary since the doctor's notes invite the making of such an inquiry. Moreover, it is the written policy of this employer that when a probationary employee is found to be performing unsatisfactorily an attempt is to be made to find out why, and available corrective measures are to be taken. Thus, Mr. Burgess, as the senior manager at OHIP, had an obligation both to

monitor Mr. Bonner's performance and, upon finding it wanting, to take the initiative to find out why, including by calling Dr. Delva for further information.

In response, it was suggested by counsel for the respondent that management's assumptions that Mr. Bonner was ready to resume a normal workload, and that information to the contrary would otherwise be provided, were quite natural in the circumstances. And further information was provided by Dr. Delva in his letter of March 30th. However, while that letter expresses the opinion that Mr. Bonner's performance over the preceding ten months was affected by his illness, and requests that this circumstance be taken into account, it in no way suggests that Mr. Bonner ought not to be working, or that he is not capable of doing the work for which he was employed. It does not suggest that special arrangements should be made.

Although he saw no reason to reply to the earlier notes that appeared only to explain a temporary condition, Dr. Delva's letter of March 30th was such that Mr. Burgess did contact him. He wrote that, while he would take the illness into account regarding the previous ten months, Mr. Bonner would have to meet OHIP's minimum requirements during the remaining two months of his probation, to which end he said management would assist Mr. Bonner "in any way we can." Although he was thereby made aware both of the employer's expectations and its willingness to assist, Dr. Delva did not suggest to OHIP that, having regard to his condition and prognosis, it was impossible for Mr. Bonner to meet the minimum standard, or improbable that he would do so. He did not suggest that some alteration of Mr. Bonner's workload might be required, let alone any specific modifications that might have enabled him to meet that standard.

Since the employer's policy requires it to determine the cause of poor performance, it may be that Mr. Burgess ought to have contacted Dr. Delva within a reasonable time after receiving the March 18th appraisal. However, his failure to do so resulted in a

delay of twelve days at most in obtaining information connecting the complainant's performance to his health, Dr. Delva's letter to that effect having been received on March 30th. If it is suggested that, in light of the February notes, Mr. Burgess ought to have made such inquiries some weeks earlier, it must be remembered that those notes dealt with Mr. Bonner's absence, not his performance. Moreover, surely an employee who returns to work despite a continuing but hidden inability to perform in the manner expected has a responsibility to inform the employer, particularly if special accommodation or treatment is desired. And surely a doctor whose patient's condition renders him incapable of performing his work properly ought not to write a letter to the employer implying that the patient is ready to return and resume a normal workload. Yet, in my opinion, that is what happened here.

In his February 2nd note Dr Delva says that Mr. Bonner "is currently suffering from marked anxiety and depression so that he is unable to work. Please do not hesitate to call me for further details." In his February 9th note he says that Mr. Bonner "has improved sufficiently that he can attempt to return to work [not "attempt to work upon his return"] on February 16/87. Please contact me for further information if desired." These letters neither expressly nor impliedly asked the employer to call Dr. Delva to discuss the problems Mr. Bonner's condition might pose regarding his ability to function adequately in the workplace. The invitation to call if more information is wanted suggests that, if the reader does not find the explanation sufficient to excuse the absence, further information will be provided on request. Dr. Delva provided no indication that he wanted the employer to call him in order to discuss the matter and, in my opinion, these notes would not have alerted a reasonable employer to the existence of a condition preventing a returned employee from doing his job properly. On the contrary, the word "currently" in the first letter suggests a temporary condition, while the second letter suggests that Mr. Bonner is likely to be able to return to work in

one week's time, the implication being that he will not make that attempt unless sufficiently improved and that, conversely, if he goes to work it will be because he is sufficiently well to do so.

I found neither the complainant nor his doctor to have been forthright in the way in which they dealt with OHIP. On the one hand, if Mr. Bonner's disability or handicap did not prevent him from performing his work properly, then it could not have been one of the causes of his failure to fulfil the requirements of the position, as the Commission alleges. On the other hand, if he was actually incapable of performing his job properly because of his disability or handicap, surely he ought not to have returned when he did. And if, despite knowing that he could not do the job properly, he returned simply because the doctor thought it would be good therapy, as was suggested at one point by Dr. Delva (V. 1, p. 24), did the employer not deserve to have been told of this strategy and, perhaps, its indulgence obtained? Finally, either Mr. Bonner and his doctor had in mind some measures that might have been taken to enable him to meet the requirements of his position, in which case he must surely have had some responsibility to apprise OHIP of what they were, or else they did not, in which case it is difficult to see how the employer could be expected to have devised such measures. If he had merely hoped that others would find a way, surely he ought to have asked for such assistance. Although the employer may have an obligation to <u>implement</u> any reasonable means that might be found for enabling the employee to perform his work properly, when the cause of his poor performance is not within management's exclusive control but is a condition affecting the employee it cannot be the employer's exclusive responsibility to <u>devise</u> or <u>discover</u> the means of overcoming the handicap. And that is so even where the employer has a policy requiring its management to seek the causes of poor performance and try to remedy them.

Regardless of any question as to who ought to have taken the initiative to see whether anything could be done to accommodate Mr.

Bonner's condition, the evidence of the complainant and Dr. Delva reveals that it was not possible to do so in such a way as to enable him to perform his work in accordance with the standard applicable to his position. In the final analysis, the Commission does not seek on behalf of the complainant an accommodation that would enable him to perform properly the job for which he was employed. Rather, it complains of a failure to accommodate the complainant either by lowering its minimum standard to the level of his actual performance, or by giving him a longer probation period in which to prove that when he is well he can attain that minimum standard.

Dr. Delva said that "in the period following his absence from work some recognition [by OHIP] of his needs and assistance I think would have helped" Mr. Bonner. And it is clearly the opinion of Dr. Delva that such recognition and assistance in periods prior to that absence would have been equally helpful to Mr. Bonner; yet the complainant did not disclose his problem to OHIP with a view to securing that recognition and assistance prior to his negative assessment when, with but two months left in his probationary period, he had Dr. Delva write to Mr. Burgess on March 30th, providing for the first time some detail as to the nature of his condition, offering the opinion that this had been affecting his patient's performance all along, and requesting that this be taken into account in appraising that performance.

As to the kind of assistance Dr. Delva thought it would be helpful for an employer to provide, he said he would like to see "consideration of the person's symptoms in the delegation of work and the speed at which the work would be required to be completed during a period of decreased functioning," such as experienced by Mr. Bonner even as early as October of 1986. (V. 1, p. 68.) Dr. Delva said that by "recognition of his needs and assistance" he was referring to "the general recognition of the disorder and the support that might help him function better." And by support he said he meant "simply talking to the individual about the person's

problems and offering to help out in any way that was reasonable." (V. 1, p. 70.) Although he assumed that he must have discussed with his patient his need for support in the workplace, Dr. Delva could not recall whether he ever raised that matter with Mr. Bonner prior to his absence in February, and he doubted that they had discussed what Mr. Bonner "might do to make his employer aware of his needs." When asked, "Why?" he replied: "Perhaps I didn't have the necessary sophistication in returning people to work at the time." (V. 1, p. 73.)

APPLICATION OF LAW

It having been admitted by the respondent that the complainant was suffering from a handicap within the meaning of Section 9(1)(b) of the Code, it is the position of the Commission that its burden of establishing on a balance of probabilities that the respondent infringed the complainant's rights under the Code by discriminating against him in his employment will be discharged upon showing that an adverse decision regarding his employment was taken, either directly or indirectly, because of that handicap. Although it was admitted that there was no direct discrimination in this case "because of a failure to understand the nature of the condition" (V.6, p. 44), it was argued that there was indirect discrimination which (apparently) may be established by proving both that the complainant was released from employment for failing to fulfil the essential requirements of his position and that a cause of that failure was his handicap. However, if the reason for releasing Mr. Bonner was that he was "incapable of performing or fulfilling the essential duties or requirements [of his position] because of handicap," his rights under the Code still would not have been infringed unless his handicap could have been accommodated reasonably, the burden being on the respondent to show that such accommodation was not possible (the Belliveau case, supra). Although they agree as to the law in that regard, the parties differ as to what amounts to reasonable accommodation in the

circumstances.

It is clear on the evidence that Mr. Bonner's performance was not satisfactory, and that his handicap had an adverse affect on his performance; but it is certainly not clear that "but for" his handicap he would have performed satisfactorily. There is no evidence that his performance in his previous employment was ever less than satisfactory, and that may suggest the probability that had he been well while at OHIP he would have met its standards. However, Mr. Bonner's own testimony leads to the conclusion not only that he did not fully grasp at the time what it was that OHIP was trying to accomplish with its programmes, but that he still lacks that understanding and persists in his disagreement with the employer as to how the work in question is to be done. Thus, it is difficult to see how one may find on a balance of probabilities that the direct cause for his release (unsatisfactory performance) was itself <u>in fact</u> caused by his handicap, in order then to reach the conclusion that the decision releasing him for substandard work was <u>indirectly</u> based on his handicap.

Even were it up to the employer to prove that the performance would have been substandard regardless of the effect of the handicap, I think the evidence points to that conclusion in this case. Thus, in my view, the Commission has failed to discharge the onus on it to establish that there was any discrimination. However, lest I am mistaken as to the allocation of the burden of proof regarding the causal connection between the handicap and the failure to meet the requirements of the position and have drawn the wrong inferences from the evidence in that regard, I turn to the issue of accommodation of that handicap.

Neither the employer nor the complainant made any effort to identify measures that might have been taken to enable Mr. Bonner to raise his performance to a satisfactory level, and even with the benefit of hindsight Dr. Delva was unable to suggest any such measures. He mentioned some actions that might possibly help to improve the health of a person in Mr. Bonner's state, but he could

not recommend anything that would enable such a person to function satisfactorily pending recovery. Indeed, there does not seem to have been any way in which the complainant's handicap could have been accommodated in the sense of enabling him to do the work competently when subject to its symptoms - as would be the case, for instance, if a ramp were installed permitting a physically handicapped employee to perform duties not otherwise possible while remaining confined to a wheelchair. And while the extent and depth of Mr. Bonner's symptoms might fluctuate so that there might be occasions when his ability is not notably impaired, circumstances beyond an employer's control might cause them to flare up at any time, once again impeding his ability to function properly for an unpredictable period of time. Thus, although modifying his workload might possibly have helped to ease his symptoms, perhaps leading to the ability to perform acceptably in the future for some uncertain length of time, the aim of such an initiative would not have been the immediate improvement of performance to a level that would meet the required standard during the remaining weeks of probation.

Assuming that indirect discrimination were found, it would not be necessary for the respondent to show that it took active measures to accommodate his handicap in order to discharge the burden of proving that Mr. Bonner was incapable of performing the duties of his position. It would be sufficient to show on a balance of probabilities that the handicap could not have been accommodated without undue hardship.

The Commission asserts that Mr. Bonner's handicap could have been accommodated by giving him more time to complete his assignments and by extending his period of probation by whatever time might be required to accumulate twelve months of symptom-free time in which to assess his performance while it was not affected by his handicap. That handicap was likened to a "dimmer switch" which affected his capacity intermittently and variably so that, while at times it rendered him unable to function in the workplace,

at other times it simply reduced his ability, but not always to such an extent as to result in unsatisfactory performance. By way of contrast, the analogy continued, the employer mistakenly dealt with his condition as though it were an "on-off" switch, assuming him always to be working at his full potential when present. The employer ought to have known that his presence in the workplace did not signify a capacity to work. It ought to have realized that even when he was present his abilities were more often than not significantly diminished. It ought to have taken steps to accommodate these fluctuations in his capacity by giving him less, and easier, work and by not counting as part of his probationary period the days on which his capacity was impaired sufficiently to affect his performance, thereby extending his probationary period beyond the anniversary of his employment to the extent thus indicated.

It was submitted by the Commission that extending probation was not only possible but that it would not have constituted an "undue" hardship. I will deal first with the question whether it was possible to grant an extension of probation before considering the issue as to whether doing so would have entailed undue hardship.

Counsel for the Commission was of the opinion that Section 6(2) of the Public Service Act, R.S.O. 1980, c. 418, as amended, entitles an employer to extend an employee's probation period, and he called as a witness Mr. George Webster, a former staff representative of the Ontario Public Service Union, Kingston region. Mr. Webster shared his view as to the interpretation of s.6(2) and testified that the Union would not become involved in such a question unless the employee disagreed with the reason for the extension. (V. 4, p. 6; Exhibit 6.)

Counsel for the respondent argued that such a view was inconsistent with Section 22 of the Act which confines the employer's right to release an employee to the first year of employment, termination of employment thereafter being only for

cause. To extend the period of employment beyond the year would be to remove the employee from the reach of the employer's right to release that is the hallmark of the probation period, and it would clothe him with the post-probationary employee's right to be dismissed only for cause. The provisions in question read as follows:

> 6.-(2) The [Civil Service] Commission shall appoint the person nominated under subsection (1) to a position on the probationary staff of the classified service for not more than one year at a time.
>
> 22.-(3) A deputy minister may for cause dismiss from employment in accordance with the regulations any public servant in his ministry.
>
> (5) A deputy minister may release from employment any public servant during the first year of his employment for failure to meet the requirements of his position.

Counsel for the respondent concluded that, even if it were possible to grant an extension of employment beyond the first year, the probationary period as such could not be so extended and, to require an employer to accommodate an employee's handicap by extending the probationary period would deprive the employer of an important right, thereby imposing undue hardship. The Commission took the view that the probationary period is not necessarily confined to a calendar year and that in some circumstances an extension of employment may retain the character of probation. It argued further that, even if such extended employment were found to lack the character of probation, no undue hardship would have been imposed upon OHIP in these circumstances had it been required to retain Mr. Bonner on its staff.

In complying with my request at the close of oral argument, Counsel for both parties provided additional written arguments as to whether the period of probation referred to in s.6(2) of the **Public Service Act** could be extended beyond a calendar year in order to take into account substantial periods during which an employee could not be assessed. In that regard, counsel for the

Commission has referred to the decision of the Grievance Settlement Board in OPSEU (Walker) v. The Crown in the Right of Ontario (Ministry of Correctional Services), January 3rd, 1990.

In the Walker case, a probationary employee in a "C.O.I" position suffered an injury for which she was entitled to "workers' compensation". That injury prevented her from performing her duties for about half of her probationary period at the end of which she was released on the basis that she had failed to meet the requirements of her position. In fact, the employer did not assess her suitability as a C.O.I., but mistakenly assessed her in relation to the position of C.O.II. Consequently, there was no finding by the employer that she had failed to meet the requirements of her position and her termination could only have been supported as a dismissal for cause. Since there was no cause for dismissal, the grievor was entitled to a remedy, and the remedy fashioned was to reinstate her as a probationary employee with a six months term.

The board also expressed the view that there had not been a proper opportunity to assess the employee and that, therefore, if it were necessary to make any finding in that regard it would conclude that her release could not have been based on a bona fide and reasonable finding that she had failed to meet the requirements of her position. The board expressed its view in this regard as follows:

> "The purpose [of the probationary period] is for the employer to have a proper opportunity to observe the probationer ... One cannot assess someone's performance while they are not performing the job due to a compensable injury, therefore, [the employer] could have treated the time in which the grievor was off sick as not counting as part of the probationary period. The one year restriction in Section 6(2) of the P.S.A. and Article 25(1) of the collective agreement should be viewed as referring to "working time" not "calendar time". This means that the employer could not extend the probationary period of an employee beyond one year simply because they did not feel twelve months of working time was sufficient to judge the person but it does allow them

> to insist that they have a full twelve months of working time in which to assess the employee ... Therefore the employer in this case could have and should have not counted the time in which the grievor was off on Workers' Compensation Board as part of her probationary period. Once she was sufficiently recovered to return to work, the "probationary time clock" would start up again and she would then complete the balance of her probationary period.

Counsel for the respondent argued that the real basis of the decision in Walker was the failure of the employer to assess the employee in relation to her position, not its view that the time periods referred to in sections 6(2) and 22(5) of the Act must mean "working time", rather than "calendar time", a view which she said runs counter to arbitral case law outside the Grievance Settlement Board. She pointed out that, since most employees are absent for some work days during the course of employment, the result of defining a year of employment in terms of days worked rather than lapsed calendar days would be that most employee's probationary periods would vary from the "year" and amongst each other. However, the view taken in this regard seems to have been central to the decision in Walker since the appropriate remedy was seen to be "to do now what the employer should have done when the grievor suffered the injury" (p. 6), that is, to reinstate the grievor "with the status of a probationary employee having completed six months of a one year probationary period" (p. 7).

Even accepting the proposition that the probation period may be taken to refer to working time rather than calendar time so that there was no legislative impediment to extending Mr. Bonner's probation, whether it ought to have been extended for reasons analogous to those involved in Walker is another matter.

Unlike Ms. Walker, this complainant was not absent from work to any significant extent and OHIP assessed his performance in good faith in relation to the entire probationary period. But the Commission in effect contends that, like Ms. Walker, Mr. Bonner was essentially absent for a very substantial period of time in that,

although physically present, his full capacity to work was missing - he was, in a manner of speaking, mentally absent. If someone cannot be assessed while physically absent, he cannot be assessed while mentally (or emotionally, or psychologically) absent. This characterization of the circumstances seems very much like wanting to have one's cake and eat it, too. As counsel for the respondent pointed out, Mr. Bonner knew of his condition, he was under doctor's care, and yet he attended work with his doctor's approval. If they thought that on those occasions when he went to work his capacity was sufficient to perform his work adequately, why should the contrary now be found? But, if they thought otherwise, was it right and proper for him to go to work?

Another distinction between this case and **Walker** is that Mr. Bonner's "absence" (if it is appropriate to so refer to his presence while affected by his symptoms) was not occasioned by a compensable injury for which OHIP had some responsibility, but was the result of a permanent condition of which he had full knowledge before his employment began.

Again, in **Walker** it could not be claimed that a bona fide evaluation was made because there was no work done at all for half the year. In contrast, Mr. Bonner worked virtually the whole year and there was a bona fide assessment of that work made by the employer. The fact that Mr. Bonner at most times was not working at full capacity does not mean that he was not working at those times and that he was therefore not assessed in respect of a substantial part of his employment. An employee may fail to work at full capacity while present in the workplace for any number of reasons not associated with handicaps as defined in s.9(1)(b) of the Code. Does **Walker** apply in such cases? What of a man distracted by a broken romance, or one beset by monumental personal problems interfering with his capacity to concentrate, such as a sick or dying wife or child? Suppose he nevertheless attends at the workplace throughout his probationary period with few if any physical absences. His performance is negatively assessed and he

is released for failing to meet the requirements of his position. Could he be heard to claim, as the Commission claims on behalf of the complainant, that his problems affected him like a "dimmer switch" and that the employer was wrong in treating him as though his capacity was an "on-off switch"? Could he insist that he was not in fact assessed even though present because his capacity was diminished? Could he plead **Walker**? I think not. Should he be able to plead **Walker** simply because his diminished capacity was caused by a s.9(1)(b) handicap rather than by some other unfortunate circumstance? Again, I think not.

While I am prepared to conclude that OHIP could have extended the period of probation, in view of the distinctions between them I am certainly not ready to accept **Walker** as an apt precedent as to whether his employer had an obligation to extend Mr. Bonner's period of probation. In my view, the answer to that question in the context of a complaint under the Code depends upon two things: whether doing so would truly have accommodated Mr. Bonner's "needs" within the meaning of the requirement and whether it would have involved undue hardship.

In his written submission of January 24th, counsel for the Commission argued that "Mr. Bonner's condition required that he not be assessed during the period that he had a major depressive episode. The respondent's position is that it could not accommodate that need. It is clear that the onus is on the respondent to prove, on a balance of probabilities, that to accommodate Mr. Bonner's needs was impossible or would amount to undue hardship." The difficulty I have with this argument is that, while it identifies a "need" of the complainant that could have been accommodated by extending his employment (if not his probation), that particular "need" does not appear to me to be of the character contemplated either by the present Code, or by the previous jurisprudence. Section 16(1a) of the Code and the case law dealing with the former s.16(1)(b) indicate that a person cannot be judged incapable of performing unless it is found "that

the needs of the person cannot be accommodated without undue hardship". Clearly the "needs" in question are needs which if met would actually enable the person to perform the work so that it can be said that, but for the failure to provide those needs, the employee would have been able to perform the work. The "needs" must be such that upon their accommodation capacity would occur and it is therefore simply false to assert that the person is presently incapable. The "needs" in question are not needs which if met might possibly enable the employee to do the work at some future time. The "need" for a deferral of activity to some future time in the hope that circumstances will change for the better is not a "need" the accommodation of which would enable the person to perform work that he or she is demonstrably unable to perform currently. It is not, in my opinion, a "need" within the meaning of that term as contemplated by the Code.

It seems to me that the true test to determine whether the "need" sought to be accommodated is a "need" within the meaning of the requirement under the Code is whether "but for" the failure to accommodate that "need" the person in question would (not might) have been capable of "performing or fulfilling the essential duties or requirements attending the exercise of the right [under the Act]." Obviously, it cannot be said that "but for" OHIP's failure to extend his period of probation Mr. Bonner would have been capable of meeting the requirements of his position during normal probation. Indeed, it cannot even be said that "but for" the failure to accommodate him he would have been capable at some future time.

Indeed, in the final analysis, since the symptoms of his handicap are both recurrent and significant the question whether Mr. Bonner is capable of doing the job when symptom-free may well be irrelevant. I would think that the employer's privilege to refuse to hire a person whose handicap renders him or her incapable of doing the work is not restricted by the Code to persons who can never do the job because of the handicap, but that it extends to

persons whose handicap prevents them from doing the job from time to time for periods of substantial duration. If an applicant were undoubtedly competent when well, so that it was beyond question that he or she would satisfy the requirements of the position when unaffected by the handicap, would it not appear to be unreasonable to require an employer to hire such a person when the recurrent effect of that handicap is that much, if not most, of the time that applicant in fact will be unable to perform the work? Does it not follow, a fortiori, that it would be unduly harsh to require the employer to engage such a person if his or her ability when well is unproven? In my opinion, a person who by reason of handicap cannot work competently on a regular basis is incapable of satisfying the requirements of the position regardless of how he or she might perform when unaffected by that handicap. And, as was said in Chamberlin v. 599273 Ontario Ltd. (1989), 11 C.H.R.R. D\110, at D/116:

> [T]he Code does not ignore the fact that certain handicaps can negatively impact on an individual's ability to perform certain types of work. If a person is unable to adequately perform a particular job because of a handicap, the Code does not entitle that person to employment in the job. What the Code does do is ensure that persons with a handicap are not discriminated against with respect to jobs they are capable of performing.

The Commission's position appears as well to be based on the premise that what is to be accommodated is not the handicap per se, but the substandard performance caused thereby. The suggestion seems to be that, while a person who is unable to perform work for a reason other than handicap may be refused employment or fired, a person who is unable to perform that work because of a handicap as defined by the Code can be neither denied employment nor fired if that inability can be accommodated in the sense (apparently) of being tolerated. That premise seems plainly wrong. Surely that which must be accommodated if reasonably possible is the handicap, not the inability. It is the employee who must be reasonably assisted to satisfy the requirements of the work, rather than the

work that must be modified to satisfy the requirements of the employee. If the employer can without undue hardship adjust the conditions of the workplace to enable the handicapped employee to do the work satisfactorily while subject to the effects of that handicap, then that must be done. But there is no requirement imposed on employers either to hire or to retain employees who, because of handicap, are in fact incapable of doing the work, simply because they have the resources to tolerate actually deficient work.

The Commission submitted that the question whether extending probation would have constituted an "undue" hardship must be answered by weighing the competing interests implicit in the circumstances of the case. On the one hand, it was said, to deny that extension would be to deny mentally handicapped persons, such as the complainant, the same kinds of protection provided under the Code to persons suffering from other kinds of handicap; on the other hand, there is no evidence that extending probation would cause "massive disruption" in the workplace.

As mentioned, one of the remedies sought on Mr. Bonner's behalf is a fresh year of probationary employment, and it was argued that to refuse him that relief would be to treat him differently from persons suffering from other kinds of handicap by denying him the same kind of protection afforded to them. The physically handicapped can demand reasonable physical changes that will accommodate their needs. The needs of the mentally handicapped are not physical, and what is required to accommodate their needs is not physical change, but time and understanding.

That argument seems merely beguiling. Regardless of the nature of the handicap, if there are no reasonable measures that could enable the employee to perform the work properly, the Code permits discrimination on the basis of the resultant incapacity. If the work in question calls for physical ability and nothing the employer can reasonably do could enable the handicapped person in question to perform it, that person could be discriminated against

on the basis of that incapacity without his or her rights being infringed. While it may be that an employer cannot refuse to hire someone as an accountant, or as a lawyer, simply because he or she is blind, or is confined to a wheelchair, an employer can refuse to hire such a person for work entailing the scurrying about on rafts of loose logs heading to the pulp mill, or for work involving clambering over the steel beams of high rise construction. Similarly, while an employer may not be able to refuse to engage a mentally handicapped person to do physical work (or any kind of work) for which the particular handicap is no impediment, there is no requirement to hire such a person to do work engaging the intellect to an extent beyond his or her intellectual, emotional or psychological capacity.

To carry the comparison forward, suppose that an applicant for the hazardous employment just described was suffering from a condition of periodic nearsightedness, at times verging on blindness, whereby his sight could be impaired with little or no warning, to varying degrees, and for periods of indeterminate and potentially lengthy duration. Obviously, an employer who knows of his handicap would not be required to take him on probation in order to assess his ability to do the job while unaffected by the condition. Suppose instead that the condition were concealed until after a negative assessment some nine months after starting the job and that, after first denying that his performance was substandard, he alleges that, if it was, his poor performance was caused by the handicap or, alternatively, that it <u>might have been</u> caused by the handicap. Can it be doubted that the employer would not be required to extend his probation in order to determine whether his performance during an equivalent symptom-free time is satisfactory? Is that situation not substantially analogous to the circumstances of this complaint?

The Commission's submissions regarding the complainant's rights may be further tested by inquiring as to the rights he would have had if, upon applying for the position, he had disclosed his

handicap and its implications. Assuming that he were otherwise qualified to be a probationary employee, could he have rightly demanded to be engaged at full pay for a period amounting to twelve months of symptom-free time, however long that might take? I am firmly convinced that a refusal to have hired him for that reason would not have constituted an infringement of his rights under the Code. And the rights of applicants to equal treatment without discrimination because of handicap are exactly the same as those of employees! Obviously, the "accommodation" Mr. Bonner would have been seeking in the foregoing hypothesis is one that could not reasonably be expected. Otherwise, anyone and everyone suffering a handicap that is periodic, or episodic, rather than constant, or continuous, could successfully demand employment on a trial basis to last as long as necessary in order to accumulate symptom-free probation time equivalent to the calendar time allotted persons without such handicaps. Presumably, if their performance while symptom-free met the minimum standard they would then have to be kept on, regardless of the recurrent nature of their symptoms. In this regard it is to be remembered that the onset of Mr. Bonner's major depressive episode while at OHIP was not occasioned by anything untoward in the workplace, and in the five years since his release he has been capable of working for only a year and a half. Obviously, at the very least the refusal to hire such a person would be justified by the undue hardship to the employer that would otherwise ensue.

While it may be that applicants have no duty to disclose their handicaps, surely a prospective employee with an invisible handicap requiring certain accommodation in order for him or her to be able to perform the work in question has some obligation to disclose that handicap if such assistance is reasonably to be expected. An applicant who conceals such a handicap in order to gain a position that could legitimately have been denied should not be able to require an employer who has in good faith provided ten months of probationary employment (and the wages to go with it) to do that

which could have been lawfully denied in the first place, namely, to provide a probationary period of twelve months of symptom-free time regardless of the calendar time required to accumulate it.

Finally, if I am wrong in my view as to the meaning of "needs" in the context of the Code, and if it were found that extended probation was a "need" the accommodation of which would have enabled Mr. Bonner to meet the requirements of his position, there remains to consider the issue of "undue hardship".

I find exaggerated the suggestion the employer must show some massive disruption of the workplace in order to establish undue hardship. If he had obtained what it is asserted to have been his due, presumably Mr. Bonner would have been entitled to have been paid for the days when he did less or easier work than his position called for; and, presumably, his remuneration could not in any way have been adjusted to reflect non-productive days for which equivalent symptom-free time should have been added to his probationary period in order to evaluate his performance when it was at its optimum. Quite apart from the difficulty of determining the number of days worked prior to the disclosure of his handicap that ought to have been transferred to the period of extended probation, the problem of ascertaining what subsequent days ought to be similarly transferred is daunting. Obviously, days not worked because of the handicap would be transferred to the extended probation. What about days worked? How would this be determined? By the unilateral decision of the employee? Could he say at the end of each day whether or not his symptoms affected his work, depending perhaps on whether he did well that day? What meaningfully role could the employer have in that process? Would a doctor's certificate be required in respect of each of the employee's assertions in this regard? Could his doctor who knows little if anything about the specific demands of the work really make a valid judgment as to the actual affect that the symptoms have on such work? Would the doctor not simply be saying that his patient claims to have been affected by his symptoms on these

particular days? And would the period of probation be extended only by the number of days in the first calendar year that had been discounted, or would the employer have to carry forward this process in a potentially unending prolongation of probation unless and until a year's worth of symptom-free days had been accumulated? And, if not, why not? The principle that justifies the extension of the probationary period beyond the calendar year justifies its indefinite duration. If the first proposition is fair and reasonable, the second must be equally so; and, by the same token, if the second proposition is unjustifiable, so must be the first. In my view these aspects of the matter demonstrate beyond doubt that to require the employer to accommodate this "need" would be to impose an undue hardship on it.

SUMMARY AND CONCLUSION

For the reasons set out above and summarized below, I am of the view that the Commission has failed to establish that the respondent infringed the complaint's right to equal treatment with respect to employment without discrimination because of handicap, contrary to sections 4(1) and 8 of the Code.

It was not contended by the Commission that there had been direct discrimination against the complainant by the respondent, and the Commission has failed to satisfy me on a balance of probabilities that there was indirect discrimination because of handicap since, in my opinion, the weight of the evidence does not suggest that the complainant would have performed satisfactorily had it not been for the affect of his handicap. In any case, even if the decision to release him for failing to meet the requirements of his position amounted to indirect discrimination against him, the complainant's rights under the Code were not infringed thereby, because he was incapable of fulfilling those requirements and no need of his could have been accommodated so as to enable him to do so. Although (in my opinion) the respondent could have extended

his employment, that would not have rendered him capable of satisfying the requirements of his position and, in any event, since such an accommodation would have involved undue hardship on the employer there was no obligation on it to do so.

Consequently, it is my decision that the complaint of Mr. Bonner against the respondents, Her Majesty The Queen in Right of Ontario and The Ministry of Health, Insurance Systems Branch, is without foundation and must be dismissed. In the circumstances, I see no reason to deal with the question of remedies.

Dated this 3rd day of February, 1992.

H.A. Hubbard,
Chairperson, Board of Inquiry